Filed 7/21/09 In re I.H. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re I.H., a Person Coming Under the Juvenile Court Law.	B211567 (Los Angeles County Super. Ct. No. CK69521)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. RENA H., Defendant; CYNTHIA S., Petitioner and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Terry Troung, Referee. Affirmed.

John L. Dodd, under appointment by the Court of Appeal, for Petitioner and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Frank J. DaVanzo, Principal Deputy County Counsel, for Plaintiff and Respondent.

Cynthia S. sought rehearing by a juvenile court judge of a referee's order ending her visitation with her grandson, I.H. The juvenile court refused to accept the petition, and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I.H., born prematurely and with medical issues, was determined to be a dependent child under Welfare and Institutions Code section 300,[1] subdivisions (b) and (g). The child was placed in foster care. Cynthia S. sought placement of the child in her home, but the court refused that request. We recently affirmed the juvenile court's ruling. (*In re I.H.* (Apr. 22, 2009, B208137) [nonpub. opn.].)

In the months after the events that led to our prior decision, I.H. remained in foster care. I.H. experienced severe asthma and required four to six hours of breathing treatments daily, as well as taking medication and saline solution through his nebulizer. Although he was nearly one and one-half years old as of early September 2008, he could not walk and barely crawled. One femur appeared to be shorter than the other, making movement difficult; it was not yet known whether his short leg impacted his hip.

I.H.'s foster mother had acted as a monitor during Cynthia S.'s visits with I.H., but in June 2008 she reported that she no longer felt safe monitoring the visits. The foster mother reported that Cynthia S. was irate during visits, cursed her, threatened her, and said mean things to I.H. Cynthia S. arrived 38 minutes late for a one-hour visit and "blew up" with profanity, according to the social worker, when she was informed about the time. In July 2008, Cynthia S. said that she wanted her visits to be scheduled at noon. When informed that this would conflict with I.H.'s naptime, Cynthia S. responded angrily that she didn't care, that was when she wanted her visits to take place. In a later conversation, Cynthia S. reiterated that she did not care about I.H.'s schedule and wanted to visit after noon.

---

[1] All further statutory references are to the Welfare and Institutions Code.

The Department of Children and Family Services (DCFS) reissued written rules to govern Cynthia S.'s visitation on July 23, 2008. Among those rules was the requirement that if she did not appear or call within 15 minutes of the visit start time, the visit would be terminated. She was not to use profanity or demonstrate disrespect for the monitor or the child. Visits would be terminated if I.H. exhibited discomfort for 20 minutes or if Cynthia S. failed to follow the visitation guidelines.

Cynthia S.'s visits continued to be problematic. I.H. cried throughout visits. Cynthia S. responded with sarcasm. On July 30, 2008, Cynthia S. burped continually during the visit. The following day, DCFS asked her to submit to a random drug test; Cynthia S. responded with profanity. Later, Cynthia S. admitted that she had been drinking heavily on the evening of July 29, 2008, and that she had a hangover on the day of her visit with I.H. She explained that prior to the visit she had vomited, and that this was why she smelled of alcohol.

On August 9, 2008, Cynthia S. called the social worker to apologize for her recent behavior. On August 14, Cynthia S. demanded a visit, saying that she didn't care if the doctor said I.H. was sick or if he was running a temperature: "I just want my visit."

Cynthia S. showed up 50 minutes late for the visit scheduled for September 17, 2008, and was irate to learn that I.H. and the foster mother had left after waiting 45 minutes. She raised her voice, cursed in the DCFS office lobby, refused to speak with the social worker, and insisted on speaking with a supervisor. After speaking with that supervisor, she demanded to speak with the supervisor's supervisor, the Assistant Regional Administrator, because she wanted her visit despite having been late.

Cynthia S. met with the Assistant Regional Administrator and other social workers. Cynthia S. remained upset and loud and did not want to speak about issues that were interfering with visitation, such as her acknowledged appearance for a visit under the influence of alcohol and her unacceptable treatment of the caseworkers and caregiver. When the social worker put the foster mother on the phone to reschedule Cynthia S.'s visit, Cynthia S. began to accuse the foster mother of not caring for I.H. because she was administering a treatment for I.H. prescribed by his doctor rather than using a home

remedy Cynthia S. had suggested. Cynthia S. demanded that the visit be rescheduled for the following Friday and did not want the caseworkers to monitor the visit. The Assistant Regional Administrator tried to explain to Cynthia S. that her behavior was disruptive to her case and to the office and that it could affect communication and her visitation rights, but she was loud and angry, and interrupted. As soon as the visit was rescheduled, she walked out of the meeting.

During the rescheduled visit, I.H. cried a lot. Cynthia S. responded, "'[I] know, they ain't your family, they took you away from us, you don't know us, they don't want you to visit us.'" She cursed periodically and had to be reminded to watch her language in front of I.H. In an attempt to stop I.H.'s crying, Cynthia S. put a whole cookie into I.H.'s mouth, over the objections of the monitor who had advised her to break the cookie into smaller pieces. Cynthia S. appeared frustrated as she tried to calm I.H. down. At a visit later in September, Cynthia S. acted appropriately with I.H., but he cried and screamed throughout the visit.

As of October 2008, DCFS observed that I.H. "continues to cry deeply" throughout visits with Cynthia S. and the social worker opined that "It is not in the best interest of the child to continue visits with [Cynthia S.] as he cries through out the visit and she says harsh words to him." DCFS described Cynthia S. as uncooperative, throwing tantrums, and impeding the case.

I.H.'s physical therapist wrote to the court on October 2, urging the court to terminate Cynthia S.'s visitation. She reported that when Cynthia S.'s visits began, I.H. transformed from a happy little boy who participated actively in physical therapy and liked to explore to a crying, stressed, tantruming child who could no longer soothe himself, had little interest in play and toys, and crawled away from caregivers—including his foster mother, who previously had been able to soothe him easily. As nothing had changed in I.H.'s surroundings except for the introduction of his grandmother, the therapist opined that the stressful visits with Cynthia S. might be responsible for his changes in behavior.

Cynthia S.'s visitation was terminated by a referee in the juvenile court on October 8, 2008. Cynthia S. petitioned for rehearing before a juvenile court judge, but the juvenile court refused to accept her petition for rehearing because she was not a party to the case. Cynthia S. appeals.

DISCUSSION

I. Allegations of Unconstitutional Delegation of Powers, Abuse of Discretion in Not Conducting Rehearing

Cynthia S. contends that the refusal of the juvenile court to afford her a rehearing of the referee's visitation termination order before a superior court judge violated the constitutional requirement that referees be limited to subordinate judicial duties. Alternatively, she contends that the juvenile court abused its discretion when it declined to grant a rehearing sua sponte. She also argues that she has been denied judicial review of the referee's actions. We reject these contentions.

Article VI, section 22 of the California Constitution provides that the Legislature may permit trial courts to appoint officers to perform "subordinate judicial duties." With an exception not relevant here concerning double jeopardy, referees may hear those matters that are assigned to them by the presiding judge of the juvenile court, "with the same powers as a judge of the juvenile court." (Welf. & Inst. Code, § 248.) When a referee hears a matter, he or she must give notice to specific parties of their right to seek review of the referee's order by the juvenile court: Section 248 provides, "A referee shall promptly furnish to the presiding judge of the juvenile court and the minor, if the minor is 14 or more years of age or if younger has so requested, and shall serve upon the minor's attorney of record and the minor's parent or guardian or adult relative and the attorney of record for the minor's parent or guardian or adult relative a written copy of his or her findings and order and shall also furnish to the minor, if the minor is 14 or more years of age or if younger has so requested, and to the parent or guardian or adult relative, with

the findings and order, a written explanation of the right of such persons to seek review of the order by the juvenile court."

Unless a court provides otherwise under section 251, section 250 provides that all orders of a referee other than those removing a minor from the home "shall become immediately effective, subject also to the right of review as hereinafter provided, and shall continue in full force or effect until vacated or modified upon rehearing by order of the judge of the juvenile court. In a case in which an order of a referee becomes effective without approval of a judge of the juvenile court, it becomes final on the expiration of the time allowed by Section 252 for application for rehearing, if application therefor is not made within such time and if the judge of the juvenile court has not within such time ordered a rehearing" sua sponte. (§ 250.)

Section 252 governs rehearing applications. "At any time prior to the expiration of 10 days after service of a written copy of the order and findings of a referee, a minor or his or her parent or guardian or, in cases brought pursuant to Section 300, the county welfare department may apply to the juvenile court for a rehearing." (§ 252.) A juvenile court judge may also grant rehearing sua sponte. (§ 253.)

When Cynthia S. attempted to request a rehearing of the termination of her visitation with I.H., the juvenile court would not accept her application because she was not the minor, the parent or guardian, or the county welfare department. She argues that the rejection of her application for rehearing by a juvenile court judge rendered the referee's underlying order an unconstitutional delegation of judicial authority: because she is not statutorily entitled to seek reconsideration of the referee's decision, the referee's decision exceeded the referee's constitutional authority and was the result of the exercise of more than a subordinate judicial duty.

Cynthia S. is correct in her assertion that the existence of a rehearing process is central to the constitutionality of the use of referees in cases not involving stipulations. In *In re Edgar M.* (1975) 14 Cal.3d 727, 735, the court explained, "The Juvenile Court Law directs referees to hear cases assigned by the presiding juvenile court judge 'with the same powers as a judge of the juvenile court' [citation] but subjects the referee's findings

and orders resulting from such hearings to procedures for their review by a regular judge. It is clear that without the availability of any review procedures the contested adjudication and disposition of a minor as a ward of the juvenile court by a referee acting without the parties' consent would violate the constitutional limitation upon his functions to 'subordinate judicial duties' [citation]."

It would indeed create a constitutional issue if there were no review procedures for the referee's decision here, but that is not the case. I.H., his mother, and DCFS each had the right to request rehearing of the decision, in which case the order presumably would have come for rehearing before a juvenile court judge. (§ 252.) Therefore, the "referee's findings and orders resulting from such hearings [were subject] to procedures for their review by a regular judge" (*In re Edgar M.*, *supra*, 14 Cal.3d at p. 735): The rehearing procedures simply had to be invoked by one of the parties to the litigation rather than by a third party. The fact that Cynthia S. is not within the universe of actors statutorily authorized to obtain rehearing on a referee's decision does not lead to the conclusion that the referee's decision was insulated from judicial review such that the referee was performing acts that exceeded the constitutional restriction to subordinate judicial functions.

Cynthia C.'s argument here—that excluding an actor from petitioning for rehearing of a referee's decision amounts to a violation of the constitutional limitation on the referee's duties—has previously been rejected in a similar context. In 1980, considering a prior version of this law, the California Supreme Court ruled that the prosecutor had no right to apply for a rehearing under the law—and that this did not create a constitutional problem with respect to subordinate judicial duties. (*In re Winnetka V.* (1980) 28 Cal.3d 587, 590-591 (*Winnetka V.*).) "The statutes' failure to give the People a right to apply for rehearing does not violate the requirement that referees perform only 'subordinate judicial duties.' [Citation.] A referee's decision is advisory only and on timely application must be reconsidered by a judge. [Citation.] However, the Legislature has expressed a policy that the People not make such an application but instead accept the referee's decision unless a judge sua sponte orders rehearing." (*Id.* at

p. 592, fn. 5.) We understand the law in the same way: the Legislature has made a policy that family members impacted by and dissatisfied with referees' rulings on their visitation in dependency cases are to appeal the rulings in question rather than to apply for a rehearing by a juvenile court judge.

Cynthia S. argues that the trend in juvenile law is toward expanding the right to rehearing within the statutory scheme. She relies on the fact that in 1997, section 252 was amended to add county welfare departments to the list of actors authorized to seek rehearing of a referee's decision by a juvenile court judge. The amendment has been recognized as intended to "'give a County Welfare Department the same rights to a rehearing by a juvenile court judge that are currently afforded to the minor and his or her parent or guardian concerning an order and findings made by a referee. . . .' [Citation.]" (*Southard v. Superior Court* (2000) 82 Cal.App.4th 729, 733 (*Southard*).) Whether or not this statutory amendment can be understood as signaling a trend toward greater access to rehearing applications, Cynthia S.'s argument is better directed toward the Legislature than the courts, for it is beyond the power of this court to make the legislative determination that noncustodial grandparents whose visitation has been terminated should be added to the list of actors statutorily authorized to petition the juvenile court for rehearing of a referee's orders. As the Supreme Court said in *Winnetka V.* with respect to an unauthorized petition for rehearing filed by a prosecutor, "[T]he right to apply is not granted the People by statute and so does not exist." (*Winnetka V., supra,* 28 Cal.3d at p. 591.)

Cynthia S. notes that in *Southard, supra,* 82 Cal.App.4th at page 733, the Court of Appeal interpreted the term "county welfare department" broadly to include county agencies that provide social services to children who have been determined to be dependents of the juvenile court. She advocates that under the rationale in *Southard,* she must have the right to apply for a rehearing as well because she, like the Department of Mental Health, is a participant in the dependency matter. Not only do the underlying facts of *Southard* differ from those here, but no word or phrase in the rehearing statute, whether read broadly or narrowly, could possibly authorize Cynthia S. to apply for

rehearing. No amount of expansive interpretation can convert a noncustodial grandparent into a dependent minor, the parent or guardian, or the county welfare department.

We are similarly unconvinced that the juvenile court had an obligation to consider Cynthia S.'s unauthorized rehearing application for the purpose of deciding whether to order a rehearing under its power to grant rehearing sua sponte. While the juvenile court may choose to consider the recommendation of a person not statutorily entitled to obtain rehearing—as in *In re Winnetka V.*, *supra*, 28 Cal.3d at page 590, when the court chose to grant a rehearing on its own motion at the informal request of the delinquency prosecutor—the Supreme Court did not hold that the juvenile court was required to consider such requests. Nothing in *Winnetka V.* suggests that because a juvenile court judge may grant a rehearing on its own motion based on the informal request of someone not authorized to apply for rehearing, the juvenile court is somehow obligated to consider, or court clerks are required to accept and place before the court, rehearing petitions filed by those without authority to seek rehearing of a referee's decision. Such a requirement would amount to a court-imposed end run around the explicit statutory limitations on those authorized to file rehearing petitions through what would essentially be a nonstatutory rehearing application process. Neither *Winnetka V.* nor any authority we have found supports Cynthia S.'s view that the juvenile court has a sua sponte obligation to consider a rehearing petition when none of the parties asks for rehearing but a person not authorized to seek rehearing is displeased with the referee's ruling.

Contrary to her contention that "when the referee terminated Cynthia's right to visitation, Cynthia was denied any opportunity for judicial review," Cynthia retained the ability to appeal the referee's decision to the Court of Appeal, as she has done. (See, e.g., *In re Shirley K.* (2006) 140 Cal.App.4th 65 [grandparents appeal denial of petition for placement of minor in grandparents' home or, alternatively, visitation]; *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1034-1035 [grandparents' standing to appeal various juvenile court decisions despite not being parties to the dependency matter].) Cynthia S.'s notices of appeal make clear that she intended to appeal both the refusal to accept the rehearing petition and the termination of her visitation. Although by

the time of briefing Cynthia S. had chosen to argue that the referee's decision was invalid for constitutional reasons rather than to directly contest the referee's reasoning, we consider the visitation ruling on its merits as well.

II. No Abuse of Discretion in Terminating Visitation

Abundant evidence supported the referee's determination that visitation with Cynthia S. was not in I.H.'s best interest. Cynthia S. was sarcastic, spoke harshly, and said mean things to I.H. At one point she told him that "they"—presumably DCFS and/or the foster mother—"'ain't your family, they took you away from us, you don't know us, they don't want you to visit us.'" She showed up for a visit with I.H. either under the influence of alcohol or recently under its influence, and when pressed about it, said that she had been drinking and that she had vomited in court earlier that day, accounting for her odor of alcohol. She was unable to comfort I.H. at visits, during which he cried continuously; at one point she tried to stop his crying by placing a whole cookie in his mouth over the instructions of the monitor. Most significantly, both I.H.'s foster mother and his physical therapist reported that once visitation began with Cynthia S., I.H. changed. Formerly a happy little boy who liked to explore, I.H. had lost the ability to soothe himself, was no longer easily soothed by his foster mother, and had lost interest in play and toys. He cried, threw tantrums, and crawled away from caregivers. With this evidence, the referee's determination that visitation with Cynthia S. was not in I.H.'s best interest was not an abuse of discretion. (*Los Angeles County Dept. of Children and Family Services v. Superior Court* (2006) 145 Cal.App.4th 692, 699, fn. 6 [orders concerning visitation reviewed for an abuse of discretion].)

III. Procedural Due Process Argument

Cynthia S. argues that it was a violation of procedural due process to refuse to grant her rehearing application. Cynthia S. claims a legally protected interest in

maintaining visitation because of United States Supreme Court decisions concerning the importance of familial relationships; because she has provided care for I.H.; because she participated actively in the dependency proceedings; and because relatives and grandparents have a substantial role in dependency matters. Cynthia has provided no authority directly supporting her argument, and it is well established that noncustodial grandparents lack a general substantive due process right of access to their dependent grandchildren. "Contrary to her apparent assumption, appellant—a noncustodial grandparent of dependents of the juvenile court—has no substantive due process right to free association with the minors, or to maintain a relationship with them. The rights of grandparents to assert control over their grandchildren are restricted by state juvenile jurisdiction to determine and protect the best interests of dependent minors. [Citations.] Appellant has not cited any California authority for her asserted substantive due process right to maintain a relationship with her dependent grandchildren. We conclude that no such constitutional right exists." (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1508; see also *Miller v. California* (9th Cir. 2004) 355 F.3d 1172, 1175-1176; *In re R.J.* (2008) 164 Cal.App.4th 219, 225.)

To the extent that the prior order of visitation could be considered to have conferred a legally protected interest on Cynthia S., she has not established that she was denied that interest without due process here. "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (*Mathews v. Eldridge* (1976) 424 U.S. 319, 335 (*Mathews*).)

Cynthia S. was given a pre-deprivation hearing by the juvenile court referee handling the dependency matter on the subject of terminating visitation, during which she was permitted to address the court. Cynthia S. has failed to demonstrate that this pre-

deprivation hearing before the juvenile court created any "risk of an erroneous deprivation" (*Mathews*, *supra*, 424 U.S. at p. 335) of her interest in visiting her grandson, nor has she identified any aspect of this hearing that failed to properly protect her asserted interest in maintaining visitation. Instead, she argues that a risk of erroneous deprivation of a protected interest arose from the juvenile court's refusal to accept her unauthorized rehearing application, and she describes the court's action as though it purported to issue a ruling on the merits without reviewing evidence: "The court simply denied the application, without looking to the merits of the application at all. A consideration of the evidence is essential to a proper exercise of judicial discretion." What actually happened is that the juvenile court would not accept her application because she was not statutorily authorized to file it. Cynthia S. has not established any legally protected interest that was impacted by the denial of access to the rehearing petition procedure after she was afforded a pre-deprivation hearing in the juvenile court, nor has she shown any risk of an erroneous deprivation of a protected interest arising from the pre-deprivation process that was afforded to her. Moreover, Cynthia S. does not even mention the other component of the second *Mathews* factor: the probable value of additional procedural safeguards. (*Mathews*, *supra*, 424 U.S. at p. 335.) She has not identified any respect in which access to the rehearing petition process would add value or better protect any of her interests.

On the final *Mathews* factor, Cynthia S. argues that there would be very little burden imposed in granting her authority to request rehearing from a juvenile court judge. While Cynthia S. is correct that reviewing this individual decision surely would not have been onerous, we can foresee that adding noncustodial parents to the list of parties authorized to apply for rehearing of decisions by the juvenile court referee could dramatically increase the burdens of juvenile court judges. Reviewing Cynthia S.'s arguments under the *Mathews* framework, she has not established that she was denied procedural due process here.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

ZELON, J.

We concur:

PERLUSS, P. J.

JACKSON, J.